(3) (2)

Nos. 90-813 and 90-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

*****

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

RENEA HICKS*
Special Assistant Attorney General

JAVIER GUAJARDO
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085

Attorneys for State Respondents
* *Attorney of Record*

December 21, 1990

QUESTIONS PRESENTED

1. Whether the results standard of Section 2 of the Voting Rights Act, as amended, applies to elective judicial systems?

2. Whether a vote dilution challenge under the results standard of Section 2 of the Voting Rights Act, as amended, can be established against a system for electing judicial officials who function as solo decisionmakers?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: *Pages:*

Statutes and Rules:

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

This memorandum, filed on behalf of the state officials who were official-capacity defendants in the district court,[1] responds to two petitions for writs of certiorari arising from the same decision and presenting virtually identical questions for review. The two petitions are *Houston Lawyers' Association v. Mattox*, No. 90-813, and *League of United Latin American Citizens, Inc. v. Mattox*, No. 90-974. The petitioners in these two cases will be referred to as "HLA" in the case of No. 90-813 and "LULAC" in the case of No. 90-974.

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[1] These respondents are: the Attorney General of Texas (Jim Mattox); the Secretary of State of Texas (George S. Bayoud, Jr.), and the thirteen members of the Judicial Districts Board of Texas. The Judicial Districts Board is comprised of the Chief Justice of the Supreme Court of Texas (Thomas R. Phillips), the Presiding Judge of the Court of Criminal Appeals of Texas (Michael J. McCormick), the President of the Texas Judicial Council (Judge Joe Spurlock, II), an attorney (Leonard E. Davis) appointed by the Governor of Texas, and the Presiding Judges of the nine Administrative Judicial Regions in Texas (Judges Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, John Cornyn, Darrell Hester, Sam B. Paxson, Weldon Kirk, Jeff Walker, and Ray D. Anderson). This memorandum will refer to them collectively as "state officials." Two Texas state district judges -- one from Harris County and one from Dallas County -- intervened in the district court proceeding as defendants in their personal capacities only. This memorandum is not filed on their behalf. Likewise, this memorandum is not filed on behalf of six Texas state district judges based in Bexar County, Texas, who appealed the district court's denial of their attempted intervention but failed to obtain an intervention ruling from the Fifth Circuit. An attorney (Mr. Wheatley) purporting to represent them has entered an appearance in this Court. Insofar as he is appearing to represent them in their official capacities as state officials, the Attorney General of Texas challenges the attorney's legal authority to appear.

OPINIONS BELOW

HLA's Appendix omitted four district court orders modifying its Memorandum Opinion and Order of November 8, 1989, HLA App. 183a-304a. It also omitted the district court's two orders on remedy. The omitted orders constitute the appendix following this memorandum.

JURISDICTION

HLA and LULAC invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision of September 28, 1990.

STATUTES INVOLVED

HLA's petition, at 3, omits from the end of its quotation of subsection (a) of the current version of Section 2 of the Voting Rights Act the phrase "in contravention of the guarantees set forth in § 1973b of this title, as provided in subsection (b) of this section." LULAC's petition, at 2-3, contains the complete text of Section 2.

STATEMENT OF THE CASE

The Fifth Circuit opinion accurately summarizes the procedural history of this case; however, heeding the Court's Rule 15.1 admonition to respondents to address any perceived misstatements of fact or law in certiorari petitions which potentially bear on the issues before the Court, the state officials supplement the Fifth Circuit's summary in response to some of the statements in the petitions of HLA and LULAC.

The Proceedings Below

At the time of trial in September, 1989, the district court had before it constitutional and statutory challenges to the Texas system of electing judges in ten Texas counties, not eleven as stated by HLA and not nine as stated by LULAC. The ten targeted counties contained 172 of the then-extant 384 (not 375) judicial districts in Texas. Now, the ten targeted counties contain 174 of the 386 judicial districts in Texas.[2]

In its November 8th liability decision, as modified in four subsequent orders, the district court rejected the plaintiffs' constitutional claims. It found that the "present system" is not maintained as a tenuous pretext for discrimination. HLA App. 283a. It later determined that the plaintiffs failed to prove "that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters." HLA App. 302a. No one appealed this determination.

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2 Awaiting decision by a three-judge federal district court in Texas is a challenge under Section 5 of the Voting Rights Act, as amended, to 13 of the 386 judicial districts in Texas, plus four judicial districts which will operate only if certain as-of-yet unmet preconditions are satisfied (and which would bring the total number of Texas judicial districts to 390). Six of the 13 (and 10 of the total of 17) newly challenged districts are in the ten counties targeted in this lawsuit. The case, tried on December 12, 1990, is *Mexican American Bar Association of Texas, et al. v. Texas, et al.*, Civ. Action No. MO-90-CA-171 (W.D. Tex.) ("*MABA*"). The challenge, lodged at overlapping, but not wholly contiguous, targets by private plaintiffs and the United States, principally is based on the November 5, 1990, letter from the Department of Justice's Assistant Attorney General for Civil Rights, HLA App. 305a-308a, as substantially modified by his letter of November 20, 1990, which is not in HLA's Appendix.

Tellingly, HLA and LULAC offer differing characterizations of the constitutional challenge rejected by the district court. HLA characterizes its challenge as one against "the at-large, winner-take-all, majority vote, numbered post requirement" for electing district judges. HLA Pet., at 5. LULAC characterizes the challenge more narrowly as one directed at a state constitutional provision establishing the manner by which smaller-than-countywide judicial districts may be created. LULAC Pet., at 6. The breadth of the district court's decision on the constitutional issue indicates that HLA's characterization is nearer the mark.

Invoking the three-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and canvassing other factors enumerated in the Senate Report on the 1982 amendments to the amended Section 2, the district court found unintentional vote dilution in all the targeted judicial districts in all the targeted counties and, consequently, a violation of the effects standard established in Section 2 of the Voting Rights Act.

In the course of reaching this result, the district court rejected the state officials' argument that any analysis of the plaintiffs' claim of unintentional vote dilution must take into account evidence about the impact of partisan voting patterns on electoral outcomes. Despite its characterization of *Whitcomb v. Chavis*, 403 U.S. 124 (1971), as having rejected a racial vote dilution challenge on the ground that partisan voting best accounted for electoral outcomes, the district court concluded that "[p]arty affiliation is ***simply irrelevant***[.]" HLA App. 287a (emphasis added).

The district court thus refused to assess in any fashion the evidence offered to demonstrate that partisan voting patterns best accounted for electoral outcomes in each of the targeted counties. The facts relevant to HLA's statement, HLA Pet., at 11, that race consistently outweighed partisan affiliation in district judge elections in Harris County have never been evaluated by a court and remain hotly contested.

Subsequently, the district court ordered implementation of a non-partisan, single-member district election system for 1990 judicial elections in the targeted counties. It is to this specific remedy, and to no other, that HLA refers when it rather vaguely states that the district court found that "an alternative electoral scheme" would provide equal opportunity to minority voters, HLA Pet., at 12.

Through separate timely notices, the state officials first appealed the liability decision of November 8, 1989, and, later, the subsequent remedial orders of January 2, 1990, and January 11, 1990. On January 10, 1990, in an event omitted from HLA's petition, the state officials filed an emergency motion to stay the district court's remedy. (Other parties had filed stay motions earlier.) The Fifth Circuit filed its stay order on January 11, 1990.

The Fifth Circuit panel, in a two-to-one vote, held that unintentional vote dilution claims could not be established against Texas trial judges whom

the district court had found to be "sole, independent decision makers." HLA App. 289a.[3]

The Fifth Circuit in an *in banc* decision on September 28, 1990, held that the effects standard of Section 2 is inapplicable in challenges to systems for electing judges. Five members of the Fifth Circuit joined the second part of a concurring opinion by Judge Higginbotham adopting the rationale that vote dilution claims under Section 2's effects standard cannot be established against solo decisionmaker judgeships. Chief Judge Clark filed a special concurrence for himself only, and Judge Johnson was the sole dissenter from the court's judgment.

LULAC misleadingly characterizes the district court's findings on vote dilution as "undisturbed on appeal." LULAC Pet., at 8 n.3. The more accurate characterization is that they were "unaddressed" on appeal. A myriad of legal and factual disputes lying beyond the basic statutory coverage question remain unaddressed thus far at the appellate level. Many of them, including one of overwhelming significance (the relevance of partisan voting patterns to vote dilution analysis), have importance in voting rights law beyond the sphere of judicial elections and will have to be addressed by the Fifth Circuit on remand and perhaps subsequently by this Court even if HLA and LULAC prevail on the questions they have presented to the Court.

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3 Contrary to the implication in HLA's petition, at p. 8, this case and the *Chisom* case out of Louisiana were *not* argued together before the Fifth Circuit panel on April 30, 1990. They were argued separately and focused on different issues.

Statement of Facts

The state officials here seek only to correct certain omissions or misstatements in the certiorari petitions which appear potentially relevant to the basic coverage issues presented to the Court. As already explained, the Fifth Circuit did not have occasion to address the many facts in this case concerning, for example, electoral outcomes in the targeted counties over the last decade. Those facts are largely irrelevant in the case's posture before this Court, and the state officials will not undertake to refute every shade of error in HLA and LULAC's recitation of the underlying facts.

Texas elects its district judges through partisan elections. Contrary to HLA's statement that both primary and general elections for state district judge have a majority vote requirement, HLA Pet., at 9-10, only the party primary elections have such a requirement. A plurality suffices for victory at the general election.

HLA is technically incorrect in its statement that every targeted county elects more than one district judge, HLA Pet., at 10. Crosby County is implicated by only one of the challenged judicial districts, the 72nd, which encompasses Lubbock and Crosby counties.

HLA also is incorrect in the statement opening its recitation of the facts of the case that Texas judicial districts may be no smaller than an entire county, HLA Pet., at 9. Section 7a(i) of Article 5 of the Texas Constitution permits the voters of a county the opportunity to authorize the

creation of judicial districts smaller than the entire county.

ARGUMENT (STATEMENT)

No Opposition to Court Review

The state officials do not oppose this Court's granting of HLA and LULAC's petitions for writs of certiorari. The questions raised are of undoubted significance to the nation's jurisprudence, many of its state judicial systems, and minority voters.

Furthermore, the state officials are constrained to concede that the *in banc* Fifth Circuit decision of September 28, 1990, conflicts with the earlier Sixth Circuit decision in *Mallory v. Eyrich*, 839 F.2d 620 (6th Cir. 1988), although the two decisions do not run on such parallel tracks that they conflict in every particular element of their analysis. It is enough that there is a basic conflict in their results.

The preceding concession by the state officials should in no way be viewed as a concession that the Fifth Circuit reached an incorrect result. It did not; however, as the state officials understand it, the correctness of the result below is not a matter with which the Court is particularly concerned at this stage of its review process.

Likewise, the concession of the appropriateness of this case for plenary (not summary) review by the Court is not a concession of LULAC's argument that the Fifth Circuit decision conflicts with the Court's summary affirmances in two cases involving the interaction of Section 5 of the Voting Rights Act and judicial elections, *Georgia State Board of Elections v. Brooks*, Civ. No.

288-146 (S.D. Ga. 1989), *aff'd mem.*, 111 S.Ct. 288 (1990), and *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986). Despite the oft-repeated claim that the two provisions, Section 2 and Section 5, operate in tandem, they remain different provisions, with different language, different applications, and different repercussions. Holding, as the Fifth Circuit did, that the effects standard of Section 2 does not cover racial vote dilution challenges to judicial elections does not present a conflict with summary affirmances in Section 5 voting rights cases affecting judges which would warrant this Court's review.

Having distinguished Section 2 cases from Section 5 cases, the state officials do note a possible additional reason why the Court should grant certiorari in this case. The United States, through its Department of Justice, has indicated that it is not bound, ***even in Texas***, by the Fifth Circuit's *LULAC* decision on Section 2's reach. *See* HLA App. 307a.[4] Instead, argues the United States, Section 5 empowers it to independently assess Section 2's reach in Texas, regardless of governing Section 2 law in the Fifth Circuit.

Texas is a covered jurisdiction under Section 5. Surely, the United States, through the Justice Department, will acknowledge that it is at least bound by a decision of this Court on the reach of Section 2. Thus, a clear statement from this Court

[4] During the trial on December 12, 1990, in the *MABA* case, *supra* at 3 n.2, the attorney for the United States continued to defend this position, which appears to contravene the Court's assessment that the United States Attorney General "does not act as a court" in exercising his Section 5 powers of review of state legislation, *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969).

on Section 2's reach will enable Texas and the United States to agree to be bound by the same judicial rulings. Texas should not be compelled to defend its position on Section 2's reach twice, once before the Fifth Circuit and, afterwards, before the United States Attorney General.

Additional Issues Within The Court's Purview

HLA urges the Court to hear this case "at the same time" as the case of *Chisom v. Roemer*, No. 90-757, HLA Pet., at 22. Whatever may be meant by this request, the state officials suggest that the Court not consolidate this case with *Chisom*. No claims of intentional discrimination remain in this case, whereas, at least as the undersigned counsel understands it, such claims do remain part of the *Chisom* case.

HLA also urges the Court to review the subsidiary question of whether the principle announced in the Fifth Circuit's panel decision concerning unintentional vote dilution claims and solo decisionmakers is correct. HLA's argument for this approach is that leaving it for the Fifth Circuit to decide on remand (if, indeed remand ultimately is necessary) would be a "time-consuming and pointless course." HLA Pet., at 25.

While the state officials have no quarrel with HLA's suggestion, they would add that HLA's rationale also suggests the advisability of this Court also taking up another question, if it ultimately agrees with the petitioners on their arguments. That question is whether *Whitcomb v. Chavis*, *supra*, remains good law under Section 2 of the Voting Rights Act. As explained earlier, the district court, through its treatment of partisan voting patterns as a legal and factual irrelevancy,

treated *Whitcomb* as a dead letter in Section 2 vote dilution analysis.

There is no reason for this Court, should it disagree with the state officials on the scope of Section 2's coverage, not to reach this additional critical question in voting rights law. It potentially is a critical question in this case, and it assuredly will be a critical question in the litigation ensuing from the upcoming round of decennial reapportionment.

CONCLUSION

This case is a critical one for states which elect their judicial officers. The state officials, while vigorously defending the correctness of the result reached by the Fifth Circuit, recognize that the questions presented here need to be definitively settled. The requisite definitiveness can occur nowhere but here -- especially in light of the United States' puzzling intransigence on the question. Based upon the foregoing matters, the state officials do not oppose the Court's granting of HLA and LULAC's petitions for writs of certiorari and the setting down of these cases for plenary review.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

RENEA HICKS*
Special Assistant
Attorney General

JAVIER GUAJARDO
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2085
Attorneys for State Respondents
* *Attorney of Record*

Dec. 21, 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC COUNCIL #4434, ET AL.,	§	Civil Action No.
vs.	§	MO-88-CA-154
JIM MATTOX, ET AL.,	§	

ORDER

Came on for consideration, Dallas County plaintiff/intervenors' Motion to Correct Clerical Mistake, and after having reviewed the pleadings, it is the opinion of this Court that said Motion is well taken and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Dallas County plaintiff/intervenors shall be noted in the style together with other plaintiff and defendant intervenors; and

2. at the conclusion of the paragraph numbered "3." that the following description of Dallas County plaintiff/intervenors shall be inserted: "plaintiff/intervenors from Dallas County, Jesse Oliver, Joan Winn White and Fred Tinsley, are black attorneys and citizens of Dallas County, Texas, each of whom is a former district judge from Dallas County,

who was defeated in a county-wide election for district judges."

SIGNED this the 14th day of November, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434	§	
et al.	§	
Plaintiffs,	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT is the State Defendants' Motion to alter or Amend this Court's Memorandum Opinion and Order of November 8, 1989 in the above-captioned cause. After this Court's Order was signed and entered, it was

brought to the attention of the Court that there were some clerical errors and omissions in this Court's Order. This Court is of the opinion that the State Defendants' Motion should be granted in part and denied in part. Accordingly,

IT IS ORDERED that this Court's previous Memorandum Opinion and Order be amended in part.

IT IS FURTHER ORDERED that the items telephonically communicated to this Court by Plaintiffs' Counsel be amended as follows:

1. The top of page 13 just before Finding of Fact number four be amended to reflect the following:

Plaintiff-Intervenors from Dallas County include Joan Winn White, Fred Tinsley and Jesse Oliver.

2. The last line of the second paragraph of Finding of Fact number eight on page 17 is amended to read, " ... greater than fifty percent (50%) Hispanic voting age population were possible."

3. The second sentence of the first full paragraph on page 21 is amended to read, "Minority residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County."

4. Conclusion of Law number 16, as continued at the top of page 90, line one, is amended to include "Hispanic" after "Black" and the appropriate comma.

IT IS FURTHER ORDERED that items 1-3, 6 & 11 of the State Defendants' Motion are hereby GRANTED.

IT IS FURTHER ORDERED in connection with item 5 of the State Defendants' Motion that Finding of Fact 20.a. on page 49 is amended as follows:

Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County. All three elections analyzed were County Court at Law Primary Elections.

IT IS FURTHER ORDERED that in connection with item 9 State Defendants' request is GRANTED IN PART to reflect that it was the 1986 Democratic Primary that was being discussed, rather than the Runoff Election. Item 9 is DENIED in all other respects.

IT IS FURTHER ORDERED that items 4, 7, 8 & 10 of the State Defendants' Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Court's Memorandum opinion and Order remains unchanged in all other respects.

SIGNED AND ENTERED this the 27th day of November, 1989.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

FILED
DEC 26 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

LULAC COUNCIL #4434, et al., Plaintiffs,	§	
	§	Civil Action No.
vs.	§	MO-88-CA-154
JIM MATTOX, et al., Defendants.	§	

ORDER

On this day came before the Court the State Defendants' Rule 60 (a) Motion to Correct Clerical Mistake. The motion is GRANTED. The last sentence of the last full paragraph on the second page of the Court's Order of November 27, 1989, is corrected to read as follows: "All three elections analyzed were 1988 Democratic Primary elections, two of which were for county court at law positions and one of which was for a district court position."

SIGNED and ENTERED this 26th day of December, 1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
DEC 28 1989
CHARLES W. VAGNER, Clerk
BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC, et al., Plaintiffs,	§	
	§	NO. MO-88-CA-154
vs.	§	
MATTOX, et al., Defendants.	§	

ORDER TO CORRECT CLERICAL ERRORS

1. In accordance with F.R.Civ.P. 60, the Court makes the following corrections of clerical mistakes in its Memorandum Opinion and Order of November 8, 1989:

2. On page 12, the following sentence is added to Paragraph 2: "Jesse Oliver, a Black from Dallas, testified that he is a member of LULAC."

3. On page 18, the following sentence is added to the end of the second complete paragraph of Paragraph 9: "This remains true when Plaintiffs controlled for voting age population of non-United States citizen of Spanish origin."

Done this 28th day of December, 1989, at Midland, Texas.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434	§	
et al.,	§	
Plaintiffs	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory

Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

> "The city is against the county,
> The county is against the state,
> The state is against the government,
> and
> The highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded, at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an Order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements deemed it advisable not to submit the question of judicial redistricting to the Special Session. The Governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or may of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably somewhere down the line the method of selection or election of State District Judges will have to submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority

voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an interim plan that the law, equity and justice require. Chisom, supra, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs, Plaintiff-Intervenors and the Attorney

General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§ 31.1031 et seq., 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V. §7 (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above Interim Plan applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE AND MICHAEL P. PEDEN to intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be dented unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition of the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

/s/
LUCIUS D. BUNTON
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
et al.	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX,	§	
Attorney General	§	
of the State of Texas,	§	
et al.	§	

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction

contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interest by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the Court that the parties to this case have the right under 28 U.S.C. Section 1292(a) (1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b) (4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment' for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e)

motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification powers are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule 59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be

made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken form an interlocutory judgment (as the Court assumes for discussion purposes that is has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal . . . ." The scope of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989). Under the holding in Coastal, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. Id. at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." Id. at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." Willie v. Continental Oil Co., 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in Willie to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. Id. at 1045. In Willie, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was empowered to deny such a motion because denial would be "in furtherance of the appeal." But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. Id. at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that

standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. Coastal, supra, at 820. Cases cited in the Coastal opinion consistently deal with granting or staying injunctions during the pendency of appeal. Id. Consistent with the analysis expressed in the Attorney General's brief, this Court interprets Coastal to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in Willie should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directive only.

Item numbered "6" at pages 6 and 7 is amended to read as follows:

> 6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

> 7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

/s/_____
LUCIUS D. BUNTON
CHIEF JUDGE